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PP v. MOHD FAZELAN MD KHUZEH

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
PRASAD SANDOSHAM ABRAHAM JCA
B [CRIMINAL APPEAL NO: B-05(S)-77-03-2015]
12 OCTOBER 2015

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – 960.01g of methamphetamine recovered from car used by accused – Alternative charge under s. 12(2) of Dangerous Drugs Act 1952 – Accused pleaded guilty to alternative charge – Sentence of eight years and ten strokes of whipping imposed by trial judge despite weight of drugs – Gravity of offence – Whether sentence adequate*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal by prosecution – 960.01g of methamphetamine recovered from car used by accused – Alternative charge under s. 12(2) of Dangerous Drugs Act 1952 – Accused pleaded guilty to alternative charge – Sentence of eight years and ten strokes of whipping imposed by trial judge despite weight of drugs – Gravity of offence – Whether sentence adequate*

E The respondent was seen running away and throwing a bunch of keys towards a pile of tyres at a tyre shop during a raid conducted by Inspector Nor Badrul Hisham ('the complainant'). The respondent was arrested and the keys thrown away by the respondent were recovered. Thereafter, the respondent led the complainant to a car which was parked in front of a house. The respondent unlocked the said car using the keys and took out a bag which
F contained packages wrapped in newspapers. Upon opening one of the packages, the complainant found small plastic packets containing pills suspected to be drugs. It was later confirmed that the pills were methamphetamine with a net weight of 960.01g. The respondent was first charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution had then preferred an alternative charge under
G s. 12(2) punishable under s. 39A(2) of the same Act for possession. The respondent pleaded guilty to the alternative charge. Despite acknowledging the weight of the drugs, the trial judge imposed the sentence of imprisonment of eight years and ten strokes of whipping. According to His Lordship, the prosecution should not have offered the alternative charge. When the
H prosecution decided to offer the alternative charge, the prosecution had chosen the safer route to get a conviction, therefore, the weight of the drugs was rendered immaterial. His Lordship further stated in his judgment that when the respondent had pleaded guilty to the alternative charge and, with no previous conviction, the respondent could have expected that the sentence
I imposed would only be less than half the maximum provided. Dissatisfied with the sentence imposed on the respondent, the prosecution filed the present appeal.

Held (allowing appeal; setting aside sentence of ten years imprisonment and substituting it with 15 years imprisonment from day of arrest; affirming sentence of ten strokes of whipping)
Per Aziah Ali JCA delivering the judgment of the court:

(1) It is trite that if the same set of facts gives rise to a distinct offence under more than one provision of a particular law or, under more than one law, it is the prerogative of the Public Prosecutor to elect, at his option, to frame a charge under whichever provision of the law that was deemed appropriate. His Lordship's views and/or comments are pure conjecture and unwarranted. (para 8)

(2) The net weight of methamphetamine was 960.01g, which was almost one kilogram. Even though the respondent had no record of previous convictions, the trial judge had failed to give due consideration to the weight of the methamphetamine. It would be reasonable to assume that based on the amount and the manner the drugs were packaged in small plastic packets, that the drugs could not have been intended for the respondent's personal consumption. Furthermore, the respondent had attempted to evade the police and had thrown away the keys when the police raided the tyre shop. His conduct showed a guilty mind. (para 9)

(3) Offences involving dangerous drugs ought not to be treated lightly so as not to trivialise the gravity of such offences. Public interest is a paramount consideration. The fact that the respondent is a first offender or that he had pleaded guilty ought to be weighed against the facts of the case, the circumstances in the commission of the offence, the type of drugs involved and the weight of the drugs. (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Responden dilihat melarikan diri dan membuang segugus kunci ke arah longgokan tayar di sebuah kedai tayar ketika satu serbuan dijalankan oleh Inspektor Nor Badrul Hisham ('pengadu'). Responden telah ditangkap dan kunci yang dibuang oleh responden dijumpai. Kemudian, responden membawa pengadu ke sebuah kereta yang diletakkan di hadapan sebuah rumah. Responden membuka kereta tersebut dengan menggunakan kunci yang dijumpai dan membawa keluar sebuah beg yang mengandungi bungkusan-bungkusan yang dibalut dengan surat khabar. Setelah membuka salah satu bungkusan tersebut, pengadu menjumpai bungkusan plastik kecil yang mengandungi pil-pil disyaki sebagai dadah. Pil-pil tersebut kemudiannya disahkan sebagai dadah jenis methamphetamine dengan berat bersih 960.01g. Responden, pada mulanya dituduh atas suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pihak pendakwaan kemudiannya mengemukakan pertuduhan pilihan di bawah s. 12(2) yang boleh dihukum di bawah s. 39A(2) Akta yang sama. Responden mengaku

A salah terhadap pertuduhan pilihan tersebut. Walaupun memperakui berat dadah tersebut, hakim bicara telah mengenakan hukuman penjara selama lapan tahun dan sepuluh kali sebatan. Menurut Yang Arif, pihak pendakwaan tidak sepatutnya menawarkan pertuduhan pilihan tersebut. Apabila pihak pendakwaan memutuskan untuk mengemukakan pertuduhan pilihan
B tersebut, pihak pendakwaan telah memilih cara yang lebih selamat untuk mendapatkan sabitan, oleh itu, berat dadah adalah tidak material. Selanjutnya, Yang Arif telah menyatakan bahawa apabila responden mengaku bersalah terhadap pertuduhan pilihan dan, tanpa sabitan terdahulu, responden mungkin mengharapkan hukuman yang bakal dikenakan hanya
C akan menjadi kurang daripada separuh maksimum yang diperuntukkan. Tidak berpuas hati dengan hukuman yang dikenakan terhadap responden, pihak pendakwaan memfailkan rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan hukuman lapan tahun penjara dan menggantikan dengan 15 tahun penjara; mengesahkan
D **hukuman sepuluh sebatan rotan)**
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Adalah tidak dipertikaikan bahawa fakta yang sama boleh menimbulkan kesalahan yang berlainan di bawah lebih daripada satu peruntukan undang-undang khusus atau, lebih daripada satu undang-undang, adalah
E hak Pendakwa Raya untuk memilih, mengikut pertimbangannya, untuk membentuk suatu pertuduhan di bawah mana-mana peruntukan undang-undang yang bersesuaian. Pandangan Yang Arif dan/atau komen adalah kesimpulan semata-mata dan tidak wajar.

F **(2)** Berat bersih methamphetamine adalah 960.01g, hampir satu kilogram. Walaupun responden tidak mempunyai rekod sabitan terdahulu, hakim bicara telah gagal memberikan pertimbangan yang sewajarnya kepada berat methamphetamine. Adalah munasabah untuk menganggap bahawa berdasarkan jumlah dan cara dadah tersebut dibungkus dalam paket plastik kecil, dadah tersebut tidak mungkin untuk kegunaan peribadi
G responden. Seterusnya, responden cuba untuk mengelakkan diri daripada polis dan telah membuang kunci apabila pihak polis menyerbu kedai tayar. Kelakuannya menunjukkan fikiran yang bersalah.

(3) Kesalahan melibatkan dadah berbahaya tidak sepatutnya diambil ringan supaya tidak remehkan keseriusan kesalahan tersebut. Kepentingan
H awam adalah pertimbangan utama. Fakta bahawa responden merupakan pesalah pertama atau bahawa dia telah mengaku salah patut dipertimbangkan berdasarkan fakta kes, hal keadaan semasa melakukan kesalahan tersebut, jenis dadah yang terlibat dan berat dadah.

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Case(s) referred to:
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC
R v. Sargeant [1974] 60 Cr App R 74

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a)
Evidence Act 1950, s. 27

For the appellant - Jasmee Hameeza Jaafar; DPP
For the respondent - Ahmad Nizam Mohamed; M/s Alias Ibrahim & Co

[Appeal from High Court, Kota Bharu; Criminal Trial No: 45A-11-6-2014]

Reported by Sandra Gabriel

JUDGMENT

Aziah Ali JCA:

[1] The respondent, Mohd Fazelan bin Md Khuzeh was first charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The prosecution had then preferred an alternative charge under s. 12(2) punishable under s. 39A(2) of the same Act for possession of 960.01g of methamphetamine in front of house at Lot 2087, Jalan Sultan Yahya Petra, Kampung Lundang, in the district of Kota Bharu in the state of Kelantan. The respondent pleaded guilty to the alternative charge.

[2] The trial judge sentenced the respondent to eight years' imprisonment from the date of arrest and ten strokes of whipping. The Public Prosecutor is dissatisfied with the sentence imposed, hence this appeal. We had allowed the appeal. We set aside the sentence of ten years' imprisonment and substituted it with imprisonment for 15 years effective from the date of arrest. We affirmed the sentence of ten strokes of whipping. We now give our reasons below.

Factual Background

[3] The facts of this case as presented by the prosecution (exh. P3) and admitted by the respondent as correct are as follows. On 5 December 2013 at about 2.05pm the complainant, Inspector Nor Badrul Hisham conducted a raid at a tyre shop. The respondent was seen running away and throwing a bunch of keys towards a pile of tyres. The respondent was arrested and the complainant recovered the keys that the respondent had thrown away.

[4] At about 10pm the same day, the respondent led the complainant and his personnel to a black coloured Honda Jazz motorcar bearing the registration No. WMK 9415 which was parked in front of a house at Lot 2087, Jalan Yahya Petra, Kampung Lundang, Kota Bharu. Investigations showed that this house was rented by the respondent and he was the sole occupant. The Honda Jazz car had been used by the respondent for a few months before his arrest.

[5] The respondent opened the said motorcar using the keys that were recovered by the complainant. The respondent opened the right rear passenger door and showed a cloth bag bearing the words 'CHANEL' which was on the floor. The complainant opened the bag and found that it contained packages wrapped in newspaper. Upon opening one of the packages, the complainant found small plastic packets containing pills suspected to be drugs. The complainant seized the exhibits. The drugs recovered were sent to the chemist for analysis. The chemist confirmed that the drugs contained methamphetamine with a net weight of 960.01g (exh. P5).

[6] Section 39A(2) of the Act provides for the punishment of imprisonment for life or for a term which shall not be less than five years, and with whipping of not less than ten strokes. Despite acknowledging the weight of the drugs, the trial judge imposed the sentence of imprisonment of eight years and ten strokes of whipping. In his written judgment, His Lordship had stated that if the weight of the drugs is the only factor to be considered, then a sentence of 18 to 20 years' imprisonment would be appropriate.

[7] His Lordship however, disagreed with the prosecution that based on the weight of the drugs, the sentence of imprisonment ought not to be less than half of the maximum term specified because, according to His Lordship, the prosecution should not have offered the alternative charge. According to the trial judge, when the prosecution decided to offer the alternative charge, the prosecution had chosen the safer route to get a conviction, so the weight of the drugs is rendered immaterial. His Lordship opined that the prosecution must have considered that, had the respondent claimed trial to the alternative charge, it would have been difficult for the prosecution to prove custody and control over the motor vehicle and the prosecution would have to rely on s. 27 of the Evidence Act 1950. The trial judge had stated that he noted that the respondent was arrested at about 2pm but the Investigating Officer (I.O.) only questioned the respondent at 9pm. This, according to His Lordship, showed that from the time the respondent was arrested, the I.O. had known where the drugs were. His Lordship had further stated in his judgment that when the respondent had pleaded guilty to the alternative charge and, with no previous conviction, the respondent could have expected that the sentence imposed would only be less than half the maximum provided.

Our Decision

[8] It is trite that if the same set of facts give rise to a distinct offence under more than one provision of a particular law or, under more than one law, it is the prerogative of the Public Prosecutor to elect, at his option, to frame a charge under whichever provision of the law that he, in his wisdom, deems appropriate. We have perused the notes of proceedings and we found nothing in the notes to support the trial judge's views regarding the prosecution of this case. We are constrained to state that His Lordship's views and/or comments are pure conjecture and unwarranted.

[9] The drugs recovered by the police contained methamphetamine with a net weight of 960.01g, which was almost one kilogram. We agreed with the prosecution that even though the respondent had no record of previous conviction, the trial judge had failed to give due consideration to the weight of the methamphetamine. It would be reasonable to assume that based on the amount and the manner the drugs were packaged in small plastic packets, that the drugs could not have been intended for the respondent's personal consumption. Further the respondent had attempted to evade the police and had thrown away the car and house keys when the police raided the tyre shop. His conduct showed a guilty mind.

[10] Learned counsel had submitted that the appropriate term of imprisonment is ten years. The learned Deputy Public Prosecutor had proposed a term of 16 years to life. With regard to the principles of sentencing, we refer to the case of *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421, FC wherein Alauddin Mohd Sheriff FCJ (as he then was) in his judgment referred to the judgment of Lawton LJ in *R v. Sargeant* [1974] 60 Cr App R 74 as follows:

> Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
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> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our Criminal Law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion ...

[11] We were of the view that offences involving dangerous drugs ought not to be treated lightly so as not to trivialise the gravity of such offences. Public interest is a paramount consideration. The fact that the respondent is a first offender or that he had pleaded guilty ought to be weighed against the facts of the case, the circumstances in the commission of the offence, the type of drugs involved and the weight of the drugs.

[12] Having considered the matters stated above, we were of the view that a sentence of 15 years' imprisonment from the date of arrest is appropriate. We affirmed the sentence of ten strokes of whipping.